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No. 01-433

In The

Supreme Court of the United States

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION,

Petitioner,

vs.

EXXON MOBIL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioner is National Telephone Cooperative Association ("NTCA").

Respondent is Exxon Mobil Corporation ("Exxon"). Exxon has no parent corporation nor is there a publicly held company owning 10% or more of Exxon's stock.

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STATUTE INVOLVED

The only statute cited in Exxon's Brief in Opposition is the Rules of Decision Act which reads:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. §1652.

STATEMENT OF THE CASE

NTCA sued Exxon for property damage as a result of leaking underground storage tanks ("USTs") at Exxon's neighboring service station. NTCA had discovered a black liquid seeping through a crack in one of its garage walls abutting the property line with Exxon. In response, Exxon repaired the wall, investigated the incident, and adopted a corrective action plan ("CAP") for cleaning up its service station site. Five years later, during the ensuing government-supervised remediation,[1] a small seepage briefly reappeared on NTCA's garage wall. NTCA alleges that this reappearance in 1995, however brief, prevented NTCA from selling its property for the next three years, resulting in various economic damages.

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[1] Dr. Sreenivas, the chief of the D.C. Department of Consumer and Regulatory Affairs, Underground Storage Tank Division, testified that Exxon's remediation was reasonable, proper, and complied at all times with Exxon's CAP.

Prior to trial, the district court dismissed NTCA's claim that Exxon negligently operated and maintained its USTs because NTCA failed to designate an expert for that theory. *National Tele. Coop. Ass'n v. Exxon Corp.*, 38 F. Supp. 2d 1, 10-11 (D.D.C. 1998). The court also dismissed NTCA's trespass, nuisance and strict liability claims, allowing only NTCA's one remaining claim – Exxon's alleged negligent remediation – to proceed to trial.

As a result of these pre-trial rulings, NTCA had to quickly shift the focus of its liability theory from leaking USTs to negligent remediation. NTCA could no longer recover simply because Exxon's leaking USTs had caused some sort of transient contamination (the brief garage seep) on its property. NTCA could now recover only if it proved that Exxon negligently remediated its site and, but for that improper remediation, the brief 1995 seepage would not have recurred.[2]

Moreover, NTCA not only lost its principal liability theory shortly before trial, it also lost its principal damage claim (diminished market value) when NTCA's property sold for $6.6 million to the Salvation Army, more than its fair market value according to NTCA's own real estate expert. NTCA once again had to quickly cobble together an alternative damage theory, this one stemming from the alleged three-year delay in selling the property.

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[2] The original seepage in 1990 had initially triggered Exxon's remediation so it could no longer serve as the injury under NTCA's negligent remediation theory.

The jury found in favor of NTCA, awarding $30,000 for the diminished value of the property and $2,459,357 in economic damages because of the alleged sale delay.[3] The district court entered judgment on the verdict. The Court of Appeals reversed, holding that "(b)ecause the NTCA did not introduce evidence of a standard of care through expert testimony as required under the law of the District of Columbia, it did not prove its case against Exxon." Pet., App. at 8.

REASONS FOR DENYING THE WRIT

I. Neither The Record Nor The Decision Below Raises The Questions Presented By The Petition

There are no compelling reasons under Rule 10 for granting NTCA's petition for a writ of certiorari. This was a diversity case decided under District of Columbia ("District") tort law. As such, no federal question is involved, no important issue of general significance is raised, and no conflict with another court of appeals is present. NTCA desperately tries to manufacture a compelling federal question. Its effort is unavailing.

First, NTCA argues that the Court of Appeals erred either because it failed to cite *Reeves v. Sanderson Plumbing*

[3] The parties stipulated to the $30,000 diminution amount, but not as to the cause of that diminution. Exxon also argued below that NTCA's last-minute engrafting of its "delay damage" theory onto its negligent remediation claim involved several fatal legal errors. The Court of Appeals did not reach those arguments.

Prods., Inc., 530 U.S. 133 (2000), or because it applied a *de novo* standard of review inconsistent with *Reeves*. Pet., at 6, 8. But the lack of citation is irrelevant and the claim of inconsistency ill-founded. The relevant portion of *Reeves* discusses the extent of an appellate court's review of the evidence on a Rule 50 motion, not the deference, if any, that an appellate court should give to a district court's determination. Nevertheless, *Reeves* strongly implies *de novo* appellate review is proper. Nothing in the opinion suggests the Court of Appeals erred in this case by independently reviewing the trial record.

NTCA mistakenly suggests that *de novo* review is somehow inconsistent with an appellate court "view[ing] the evidence in the light most favorable to [the verdict winner] and resolv[ing] all conflicts in his favor." *Scott v. District of Columbia*, 101 F.3d 748, 752-53 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1231 (1997). *De novo* review means only that the appellate court itself applies the same standard to the evidence as did the district court, *id.*, although that mundane point is immaterial here. In its *de novo* review of the expert testimony, the Court of Appeals did not have to make any credibility determinations or weigh the evidence in order to conclude that there was **no testimony** presented by NTCA of a "prevailing practice or a national standard applicable to Exxon's efforts at environmental remediation." Pet., App. at 7. Without such testimony, there was plainly "no legally sufficient evidentiary basis for a reasonable jury to find" that NTCA had established the applicable standard of care for petroleum remediation as required under District negligence law. FED. R. CIV. P. 50. *See* Pet., App. at 8.

Second, after arguing that the Court of Appeals erred in not applying *Reeves*, NTCA makes the contradictory argument that the Court of Appeals violated *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), by not resolving all ambiguities in the evidence in favor of NTCA as required by District law. Pet. at 11, 6-7 (noting a split in the circuits as to whether a federal court should apply the same standard on a motion for judgment as a matter of law as the state court would apply). However, no *Erie* issue is raised by this appeal. "Because the Rules of Decision Act, 28 U.S.C. §1652, is not applicable to the District, [the Court of Appeals is] not strictly required by *Erie* . . . , to ascertain and apply District law." *Halberstam v. Welch*, 705 F.2d 472, 429 fn.10 (D.C. Cir. 1983) (although the Court of Appeals looks to District law to promote uniformity). *See also Gray v. American Express Co.*, 743 F.2d 10, 16 (D.C. Cir. 1984).

Moreover, even if *Erie* did apply, the principles governing the application of Rule 50 in federal courts are the same as those applied under District law. *See Cotton v. Buckeye Gas Prods. Co.*, 840 F.2d 935, 937 (D.C. Cir. 1988). *See generally Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 782 (D.C. Cir. 1998) ("[w]e consider all evidence in the light most favorable to the nonmoving party"). The Court of Appeals simply found no ambiguity in the trial testimony that needed to be resolved.

Third, NTCA seems to suggest that the Court of Appeals created an additional "*Erie* problem" by misapplying the District's substantive law. Pet., at 6. Notwithstanding the fact that *Erie* has no strict applicability, the misapplication of substantive state law does not raise *Erie* concerns, *i.e.*, whether state law governs a particular

issue. The Court of Appeals appropriately looked to District negligence law – not federal common law – in determining whether NTCA had established the requisite standard of care.

Citing the most recent opinion from the District, the Court of Appeals first identified how the standard of care must be proven under District tort law:

> [T]he expert must clearly articulate and [refer to] a standard of care by which the defendant's actions can be measured. . . . Thus the expert must clearly relate the standard of care to the practices in fact generally followed by [similarly situated parties] or to some standard nationally recognized by such [parties].

Pet., App. at 2 (quoting from *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 433 (D.C. 2000)). The Court of Appeals then acknowledged the well-established District rule that merely criticizing a defendant's actions or offering the "personal opinion of the testifying expert as to what he or she would do in a particular case, without reference to a standard of care, is insufficient to prove the applicable standard of care." *Id.* (quoting from *Travers v. District of Columbia*, 672 A.2d 566, 568 (D.C. 1996)).

Applying these well-established tort principles, the Court of Appeals concluded that NTCA's expert "described the standard of care with respect only to an ultimate goal [i.e., hydrogeologic control] that the defendant failed to meet, not with respect to any 'practices in fact generally followed' or 'to some standard [that is] nationally recognized' from which [Exxon] departed." Pet., App. at 2 (quoting from *Arnold & Porter*, 756 A.2d at 433). *See also* Pet., App. at 7 (NTCA's expert "consistently

couched his criticisms in terms of his personal opinion, which does not suffice under the law of the District"). While NTCA may disagree with the Court of Appeals' application of the District's substantive law and, therefore, the conclusion it reached, such disagreement over the application of state law does not warrant a writ of certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (this Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). *See also Thomas American Home Prods. Inc.*, 519 U.S. 913, 916-17 (1996) ("this Court's function . . . is not to correct federal courts' misapplications of state law, except, perhaps, in exceptional cases with importance beyond the parties' particular dispute") (Scalia, J., concurring).

II. The Court Of Appeals Correctly Determined That NTCA Failed To Establish The Applicable Standard Of Care

Even if error correction was a proper basis to seek this Court's certiorari jurisdiction, there is no grounds for such review here since the standard of care issue was correctly decided by the Court of Appeals. NTCA's theory below, as well as in its petition to this Court, is that the goal[4] of Exxon's remediation was to prevent any further contamination of NTCA's property by obtaining

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[4] That Campbell testified obtaining hydrogeologic control was a "goal" of the CAP cannot be gainsaid: "[Exxon] had a few stated goals in their corrective action plan, one of which was to obtain hydraulic control or be able to control the direction of groundwater flow where it went and when it went there." Resp. App. at 1.

and maintaining hydrogeologic control; contamination briefly reappeared on NTCA's property in 1995 during the (at that point) five-year-old remediation; therefore, Exxon was negligent.

NTCA's argument confuses two separate concepts: (1) Exxon's remediation goal – obtaining and maintaining hydrogeologic control – and (2) the appropriate standard of care for achieving that control. NTCA's burden was to establish through expert testimony the standard applicable to Exxon's **performance** of the remediation, not that its remedial goal was common, something no one disputed. In other words, NTCA had to show how in executing the remediation Exxon failed to conform with "practices in fact generally followed" by hydrogeologists in petroleum remediations or to "some standard nationally recognized" by hydrogeologists. *Arnold & Porter*, 756 A.2d at 433.

By confusing the remedial goal of hydrogeologic control with the standard of care to be followed in trying to achieve such control, NTCA converted its negligence claim into one of strict liability: No matter what Exxon did, unless its remediation was absolutely successful in obtaining and maintaining complete hydrogeologic control at all times over the entire site, Exxon was negligent. Yet the failure of Exxon to fully achieve its goal of maintaining complete hydrogeologic control at all times was no more indicative of negligence under District law than a surgeon who fails to cure a patient. Although the "goal" of surgery might be to repair an organ, the failure of the patient to get better following surgery does not mean the surgeon was negligent. Before negligence can be

imputed, we need to know what surgical practices, techniques or standards the surgeon violated, if any, during surgery. *See Meek v. Shepard*, 484 A.2d 579, 581 (D.C. 1984) ("mistakes that a particular doctor makes are not actionable unless they cause the doctor's performance to fall below the applicable standard of care").

In this case, Exxon's CAP had two parts: (1) a pump and treat system for groundwater contamination and (2) a soil vapor extraction ("SVE") system for soil contamination.[5] There was considerable testimony that these remedial technologies (pump and treat/SVE) were common. *See, e.g.*, Pet., App. at 13.[6] Indeed, as the district court explained, all parties recognized that NTCA's claim was not that the CAP was faulty, it was "that Exxon had not **executed** the remedial efforts in compliance with the standards of the industry. . . . " *Id.* (emphasis added).

The glaring problem was that NTCA's expert Campbell never identified any portion of the CAP he claimed constituted a nationally recognized hydrogeological practice that Exxon violated (or failed to execute). Testifying

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[5] Pump and treat is a series of pumping wells connected to a filter treatment system; SVE is like a big vacuum cleaner pulling air, along with the contaminants, through the subsurface soils.

[6] However, there was no testimony that the "goal" of the CAP – to obtain and maintain hydrogeologic control – somehow constituted a national standard of care, to the extent that even makes sense. *See Levy v. Schnabel Foundation Co.*, 584 A.2d 1251, 1256 (D.C. 1991) (to perform construction work so that adjoining buildings are not damaged "sound[s] more like a lofty goal, or perhaps like a perceived rule of law, than like a description of acceptable practices").

that there is always more than one way to clean up a site, Campbell simply iterated four things he would have done differently: (1) used a different type of pump in the wells; (2) excavated more dirt during tank removal; (3) drilled more wells; and (4) used a different SVE unit. Pet., App. at 7-8.[7] As the Court of Appeals explained, though, these four suggestions were either unrelated to the CAP, thereby requiring Campbell to establish an industry standard outside the CAP to prove Exxon's negligence, or inconsistent with the CAP's requirements, thereby requiring proof of an industry standard more stringent than the CAP.[8] Either way, the CAP could not provide a standard against which Exxon's conduct could have been measured under NTCA's proofs at trial.

As the Court of Appeals also explained, instead of establishing an industry standard outside the CAP, Campbell merely offered his personal opinion as to what he would have done differently. For example, while acknowledging that Exxon's pumps were "commonly used" by hydrogeologists, Campbell testified that he would have used a different type of pump: "The pump

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[7] In its petition, NTCA tries to avoid any discussion of Campbell's deficient testimony, claiming "the minutiae of *how* hydrogeologic control would be obtained" is irrelevant. Pet., at 17. NTCA still fails to recognize that the "minutiae of how" is precisely the standard of care that had to, but was not, established by NTCA.

[8] The CAP simply did not address the issues of (1) the type of pump and (2) the excavation of dirt during tank removal. On the other hand, the CAP expressly set forth the number of wells that were to be drilled by Exxon (3) and the type of SVE unit Exxon used (4).

that **I like** to use, and **I think** is more effective under these situations . . . is a bottom-loading pump." Resp. App. at 2 (emphasis added). As to the tank pull: "**I believe**" removing more contaminated soil would have assisted the remediation. Resp. App. at 2 (emphasis added). On the number of wells: "**I think** they had insufficient number of recovery wells," although conceding that "two different hydrologists . . . look[ing] at the same situation, . . . might come up with a different answer as to how you might place all the different wells." Resp. App. at 1 (emphasis added); Resp. App. at 2-3. When discussing the choice of SVE: "**I feel** that carbon or catalytic oxidation would have been a better [SVE] choice." Resp. App. at 2 (emphasis added).

The proof in this case ended up being Campbell's "I would have done it differently" because "I believe" my way would have better assisted the remediation. Such testimony is clearly deficient under *Meek v. Shepard*, 484 A.2d 579 (D.C. 1984), the first in a long line of District precedent holding that an expert cannot establish a standard of care by simply testifying as to what he would have done differently in similar circumstances. *See id.*, at 582 (holding that from this kind of testimony "no reasonable juror could have determined what the standard of care was"). *See also Arnold & Porter*, 756 A.2d at 433 ("it is insufficient for the expert to state his opinion as to what he or she would have done under similar circumstances") (internal quotation omitted).

In sum, Campbell's testimony simply criticized various details of Exxon's remediation without offering any evidence of an industry-wide practice, procedure, or code of conduct; no "objective standard" by which Exxon's

efforts could have been measured; no "factual basis" beyond his own personal opinion with which the jury could have evaluated Exxon's conduct. *See Smith v. Haden*, 872 F. Supp. 1040, 1045 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995). That is why the Court of Appeals concluded it "cannot deem the CAP's stated goal of 'ensur[ing] hydrogeologic control' a standard of care on this record because it stands unrelated to any accepted practice or standard to which Exxon should have but failed to conform." Pet., App. at 7.[9]

III. The Court Of Appeals Did Not Err In Denying NTCA A New Trial

After the Court of Appeals' decision, NTCA filed a petition for rehearing, petition for rehearing *en banc*, and motion for new trial. On June 14, 2001, the petition for rehearing and motion for new trial were denied by both the panel and by the court *en banc*, in separate per curiam orders. NTCA contends those orders were wrong because it should have been given another chance to try its case, citing *Weisgram v. Marley Co.*, 528 U.S. 440 (2000). Pet. at 21. Once again, NTCA is seeking only alleged error correction, an inappropriate basis for certiorari jurisdiction. Nevertheless, as with the standard of care issue, the

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[9] The Court of Appeals also held that NTCA adduced no testimony that any alleged CAP breach caused the loss of hydrogeologic control (and ensuing harm) since Campbell could not testify that it was even possible to maintain complete hydrogeologic control over the entire site without interruption. Pet., App. at 8. Merely linking the brief 1995 seepage with Exxon's USTs was not enough after the pre-trial rulings.

panel, as well as the Court of Appeals *en banc*, correctly denied NTCA's new trial motion.

In *Weisgram*, this Court explained that the "court of appeals has authority to render the final decision" on whether judgment should be entered on a Rule 50 motion in favor of the moving party:

> If, in the particular case, the appellate tribunal determines that the district court is better positioned to decide whether a new trial, rather than judgment for defendant, should be ordered, the court of appeals should return the case to the trial court for such an assessment. But if, as in the instant case, the court of appeals concludes that further proceedings are unwarranted because the loser on appeal has had a full opportunity to present the case, including arguments for a new trial, the appellate court may appropriately instruct the district court to enter judgment against the jury-verdict winner. Appellate authority to make this determination is no less when the evidence is rendered insufficient by the removal of erroneously admitted testimony than it is when the evidence, without any deletion, is insufficient.

Id., at 443-44.

Unlike our case, *Weisgram* involved a Rule 50 determination after removal of erroneously admitted testimony. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), on the other hand, involved a Rule 50 determination that the evidence, without any deletion, was insufficient. In *Neely*, this Court explained that there might be situations in which the party whose evidence was found insufficient might still be entitled to a new trial for other

reasons: "The erroneous exclusion of evidence which would have strengthened [the plaintiff-appellee's] case is an important possibility. Another is that the trial court itself caused the insufficiency in plaintiff-appellee's case by erroneously placing too high a burden of proof on him at trial." *Id.*, at 327.

Despite adequate opportunity, NTCA has failed to identify any of the *Neely* grounds for a new trial. In fact, NTCA has presented no basis for a new trial either before the Court of Appeals or in its present petition. Rather, NTCA's position seems to be that despite its failure at the first trial to establish a standard of care – and even though there were no errors by the district court at the trial – it should now be given another opportunity, as if a finding that there was insufficient evidence alone entitles it to a new trial. NTCA cites no decision that has sanctioned such an extraordinary request.

After reviewing NTCA's expert testimony, the Court of Appeals found that there was no evidence establishing the applicable standard of care. None. This was not a linguistic problem or a difference in terminology. This was a proof problem. And this lack of evidence had nothing to do with the district court's "first-hand knowledge of witnesses" or the district court's "feel" for the case. Pet. at 21. The testimony of NTCA's expert simply failed to provide an essential element of NTCA's negligence claim, a failure, as the Court of Appeals correctly noted, that was "fatal to the NTCA's case." Pet.,

App. at 8. Under these circumstances, a new trial is unwarranted.

CONCLUSION

For all of the foregoing reasons, Exxon respectfully requests that this Honorable Court deny the Petition For a Writ of Certiorari.

Dated: October 11, 2001

Respectfully submitted,

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Excerpts from the Trial Testimony of NTCA's Expert Kent Campbell

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Q. Generally speaking – and we will go into these – can you identify what was wrong with the NTCA efforts? Excuse me, with the Exxon efforts to remediate the contamination.

A. In general terms, yes, I can.

Q. Okay. Go ahead.

A. They had a few stated goals in their corrective action plan, one of which was to obtain hydraulic control or be able to control the direction of groundwater flow where it went and when it went there. And I don't think they ever really achieved the goal.

Q. Do you have any explanation for why that happened or didn't happen, I guess? Why they didn't get hydraulic control?

A. I think they had insufficient numbers of recovery wells adjacent the NTCA property to be able to capture all of the groundwater that was flowing from the Exxon station towards the NTCA property.

* * *

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Q. Okay. Would you sort of maybe, given the shape – just flip over to the next chart. Take your black marker and show the jury what kind of pump you believe they should have used.

A. The pump that I like to use, and I think is more effective under these situations where you're trying to pump both water and product, is a bottom-loading pump. And I'll explain the modification thereof in a minute.

* * *

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Q. Would excavating this site in November of 1991, when they had the hole already open, have assisted in the remediation of this site?

A. Yes.

Q. Would it have assisted materially?

A. I believe so, yes.

* * *

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Q. And, in your opinion, both of those systems are more reliable than the thermal oxidizer that was chosen?

A. They would be more reliable given the specific data from this site.

On other sites the reliability issue is really not – may not be a problem, but for this site specifically, yes, I feel that carbon or catalytic oxidation would have been a better choice.

* * *

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Q. Now, when two different hydrogeologists in your field look at the same situation, two of them might

come up with a different answer to how you might place all the different wells; isn't that right?

A. Yes.